No. 11894

In the United States Circuit Court of Appeals for the Ninth Circuit

PRINTING SPECIALTIES AND PAPER CONVERTERS UNION, LOCAL 388, A. F. OF L., AND WALTER J. TURNER, APPELLANTS

v.

HOWARD T. LEBARON, REGIONAL DIRECTOR OF THE TWENTY-FIRST REGION OF THE NATIONAL LABOR RELATIONS BOARD, ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, APPELLEE.

ON APPEAL FROM AN ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLEE

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JURISDICTION

This is an appeal from an order of the District Court for the Southern District of California granting a petition filed on behalf of the National Labor Relations Board, herein referred to as the Board, by Howard T. LeBaron, the Regional Director for the Twenty-first Region of the Board, pursuant to Section 10 (1) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. A., 1947 Supp., Sec. 151, *et seq.*), herein referred to as the Act. The

order enjoins appellants from engaging in certain unfair labor practices as defined by Section 8 (b) (4) (A) of the Act, pending final adjudication of the matter by the Board (R. 139).[1] The order was entered on February 16, 1948 (R. 140). Notice of Appeal to this Court was filed on March 1, 1948 (R. 142). The opinion of the court below is reported at 75 F. Supp. 678.

Appellant Printing Specialties and Paper Converters Union, Local 388, A. F. of L., herein referred to as the Union, is a labor organization within the meaning of the Act, and has its principal office within the Southern District of California (R. 135). Appellant Walter J. Turner is an agent of the Union within the meaning of Sections 2 (13) and 10 (1) of the Act (R. 135). Both appellants are engaged in the Southern District of California in promoting and protecting the interests of the members of the Union (R. 135). The unfair labor practices charged were committed within the Southern District of California (R. 136–137).

As shown by the petition (R. 2, *et seq.*), the jurisdiction of the court below was based on Section 10 (1) of the Act. The jurisdiction of this Court is invoked under Sections 128 and 129 of the Judicial Code (28 U. S. C. 225 and 227).

STATUTE INVOLVED

The statutory provisions primarily involved are Sections 8 (b) (4) (A), 8 (c) and 10 (1) of the National

[1] References to the printed transcript of record are designated "R."

Labor Relations Act, as amended. These provisions are set forth in the Argument (*infra,* pp. 9–10, 11–12, 35).

STATEMENT OF THE CASE

The petition in the court below alleged that Sealright Pacific, Limited, herein referred to as Sealright, had filed a charge with the Board alleging that appellants had engaged in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act and affecting commerce as defined in Sections 2 (6) and 2 (7); that the charge had been referred to appellee for investigation; and that, after making a preliminary investigation, appellee had reasonable cause to believe that the charge was true and that a complaint should issue. The petition prayed for an injunction restraining the unfair labor practices pending final adjudication by the Board (R. 2–9). Appellants moved to dismiss the petition on the ground that the provisions of the Act relied on were violative of the First, Fifth and Thirteenth Amendments to the Constitution (R. 10–11). The court below overruled appellants' motion and thereupon, on the basis of the substantially undisputed facts as set forth in the verified petition and an affidavit submitted by appellants in support of the motion to dismiss, entered its order granting the relief prayed (R 112, 133–142).

The verified petition and the affidavit submitted in support of the motion to dismiss, showed, without dispute, the following facts:

Sealright is engaged at Los Angeles, California, in the manufacture, sale, and distribution of paper food containers. In the course of its business it purchases

and causes to be transported to its Los Angeles plant from points outside California, various materials valued in excess of $1,000,000 annually. It ships various products to points outside California valued in excess of $500,000 annually (R. 4).

On November 3, 1947, the Union called a strike of its members employed by Sealright in support of its demands with respect to certain terms and conditions of employment (R. 23). Thereafter, appellant Turner, as Secretary-Treasurer of the Union, informed the Los Angeles–Seattle Motor Express, Inc., herein referred to as L. A.–Seattle), a common carrier which transported Sealright's products, that if L. A.–Seattle continued to handle Sealright's products, the Union would picket Sealright's products handled by L. A.–Seattle (R. 24). On November 14, 1947, representatives of the Union followed two trucks loaded with Sealright's products to the terminal of L. A.–Seattle and there formed a picket line around the two trucks (R. 25). The representatives of the Union forming the picket line informed the employees of L. A.–Seattle that the trucks contained "hot cargo" and told or requested them not to handle it (R. 25). As a result of the picketing the employees of L. A.–Seattle refused and continued to refuse to handle or transport Sealright's products (R. 5). On or about November 17, 1947, and thereafter, the Union also placed a picket line around three freight cars at the docks of the West Coast Terminals Company, herein referred to as West Coast, at Long Beach, California, upon which rolls of paper consigned to Sealright were

being loaded (R. 5, 25). As a result, the employees of West Coast likewise refused to handle the goods consigned to Sealright (R. 5–6). The purpose of the Union's conduct was to require L. A.–Seattle and West Coast to cease handling and transporting the goods and products of Sealright (R. 5–6, 24–26).

Upon the foregoing undisputed facts, the court below found that there was reasonable cause to believe that appellants had engaged in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act, affecting commerce within the meaning of Section 2 (6) and (7) of the Act (R. 134). The court below also concluded that Section 8 (b) (4) (A) of the Act was not repugnant to the First, Fifth, or Thirteenth Amendments to the Constitution of the United States (R. 140). Accordingly, it overruled appellants' motion to dismiss the petition and issued an order enjoining appellants from (R. 139–140):

> Engaging in, or inducing or encouraging, the employees of any employer, by picketing, orders, force, threats, or promises of benefit or by any other like or related acts or conduct to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is forcing or requiring any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Sealright Pacific, Ltd.

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SUMMARY OF ARGUMENT

The instant case was initiated pursuant to Section 10 (1) of the Act. Section 10 (1) empowers the district courts of the United States to grant, upon application of the Board, such interlocutory injunctive relief as is just and proper pending determination by the Board of unfair labor practice charges filed under Section 8 (b) (4) of the Act, where there is reasonable cause to believe that such unfair labor practices are being committed. The court below properly found that there was reasonable cause to believe that appellants, by means of picketing, were, in violation of Section 8 (b) (4) (A) of the Act, inducing and encouraging the employees of L. A.-Seattle and West Coast to engage in a concerted refusal to handle or transport the goods of Sealright, an object thereof being to compel the former to cease doing business with the latter.

Neither Section 8 (b) (4) (A) of the Act, nor the order of the court below enjoining such conduct on the part of appellants, violates the constitutional guaranty against involuntary servitude. The Act and the order merely prohibit labor organizations or their agents from engaging in strikes or inciting employees to engage in strikes or concerted refusals to perform services for the stated object. Neither the Act nor the order of the court below requires employees to continue working against their will.

The Act, insofar as it enjoins picketing where used to induce or encourage employees to engage in a strike or concerted refusal to perform services for the ob-

jects enumerated therein, does not violate the constitutional guaranty of free speech but represents a valid exercise of the Congressional power over commerce. Congress may, in order to narrow the area of industrial conflict and protect the public interest in the free flow of commerce, illegalize picketing where it is utilized to conscript the employees of a neutral employer in order to bring pressure to bear upon an employer involved in a labor dispute. Congress may prohibit picketing for an unlawful purpose, without transgressing constitutional limitations.

Section 8 (b) (4) (A) of the Act draws no distinction between the incitation of employees to engage in a total strike or a "product boycott" in furtherance of the enumerated objectives. Such a distinction is not supported either by the Act itself or its legislative history.

Section 8 (b) (4) (A) of the Act cannot be successfully challenged on the ground that it is so vague and indefinite as to violate the due process provision of the Constitution. The statute furnishes an adequate guide as to what conduct is proscribed and is as specific as the nature of the problem permits.

The protection which Section 8 (c) of the Act extends to the expression of views, argument, or opinion which contain no threat of reprisal or force or promise of benefit does not immunize the picketing engaged in here by appellants. Picketing is more than speech; it is a coercive technique, possessing elements of compulsion. Apart from its coercive aspect in this sense, picketing implicitly contains a threat of reprisal

and a promise of benefit in that it is an appeal to all workers to make common cause with the picketing group with the promise that if they respond they will receive similar aid when the occasion arises and with the threat that if they ignore the appeal, they will be refused assistance when they are similarly situated. These elements of picketing satisfy the requirements of Section 8 (c) of the Act.

Section 10 (1) of the Act does not confer non-judicial functions on the district courts. A proceeding under Section 10 (1) is a case or controversy within the meaning of Article III of the Constitution.

ARGUMENT

Preliminary Statement: The statutory scheme pursuant to which the present proceedings were initiated in the court below

As already stated, these proceedings were initiated pursuant to the provisions of Section 10 (1) of the Act. The Act empowers the Board, upon the filing of appropriate charges, to issue, hear and determine complaints that employers or labor organizations have engaged in unfair labor practices within the meaning of the Act (Section 10 (a), (b) and (c) of the Act). Proceedings of this character, requiring as they do investigation, hearing and consideration of the alleged unfair labor practices, are necessarily protracted and time consuming. Congress believed that certain unfair labor practices committed by labor organizations gave, or tended to give, rise to such serious and unjustifiable interruptions to commerce that their continuation, pending adjudication by the Board, would result in

irreparable injury to the purposes of the Act.[2] Accordingly, in order to prevent such a frustration of the statutory purpose, Congress provided in Section 10 (1) of the Act that—

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4), (A), (B), or (C) of Section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true, and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition, the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charg-

[2] S. Rep. No. 105, 80th Cong., 1st Sess., p. 8.

> ing party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition, the courts shall cause notice thereof to be served upon any person involved in the charge, and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. * * *

The relief contemplated in Section 10 (1) of the Act, and herein prayed for and granted, is in the nature of an interlocutory injunction. It is limited to such time as may expire before the Board issues its final order with respect to the unfair labor practices charged. As in the case of traditional equity practice with respect to interlocutory relief,[3] the prerequisite to the granting of the relief contemplated by Section

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[3] *Bowles* v. *Montgomery Ward & Co.*, 143 F. 2d 38, 42 (C. C. A. 7); *Colorado Eastern R. Co.* v. *Chicago, etc., Ry. Co.*, 141 F. 898, 901 (C. C. A. 8); *Sinclair Refining Co.* v. *Midland Oil Co.*, 55 F. 2d 42, 45 (C. C. A. 4); *Northwestern Stevedoring Co.* v. *Marshall*, 41 F. 2d 28, 29 (C. C. A. 9); *City of Louisville* v. *Louisville Home Telephone Co.*, 279 F. 949, 956 (C. C. A. 6); *United States* v. *Parrott*, 27 Fed. Cas. 417, 430, 435 (C. C. N. D. Cal.); *Eastern Texas R. Co.* v. *Railroad Commission*, 242 Fed. 300 (D. C. W. D. Texas).

10 (1) of the Act is a finding by the district court that there is reasonable cause to believe that a violation of the Act, as charged, has been committed, and that equitable relief would be "just and proper." The court is not called upon to decide whether in fact the charges are true or whether in fact a violation has been committed. The ultimate determination of the truth of the charges and the existence of a violation is reserved exclusively to the Board, subject to review by the circuit courts of appeals pursuant to Section 10 (e) and (f) of the Act.[4]

I

The District Court properly found that there is reasonable cause to believe that appellants have, as charged, engaged in unfair labor practices in violation of Section 8 (b) (4) (A) of the Act

Section 8 (b) (4) (A) of the Act provides, in part, that:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

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[4] *Douds* v. *Teamsters Union Local 294*, 75 F. Supp. 414 (N. D. N. Y.); *Styles* v. *Local 74*, 74 F. Supp. 499 (E. D. Tenn.); *Douds* v. *Wine, Liquor & Distillery Workers Union Local 1*, 75 F. Supp. 447 (S. D. N. Y.); *LeBaron* v. *Printing Specialties and Paper Converters Union, Local 388*, 75 F. Supp. 678 (S. D. Calif.); Cf. *Evans* v. *International Typographical Union, et al.*, 76 F. Supp. 881 (S. D. Ind.).

> (A) forcing or requiring * * * any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.

The undisputed evidence summarized above fully supports the holding of the court below that there is reasonable cause to believe that (R. 136):

> (d) On about November 14, 1947, representatives of [the Union] followed two trucks loaded with Sealright's products to the L. A.-Seattle terminal where by forming a picket line around two trucks containing the products of Sealright and telling the employees that the trucks contained "hot cargo" and not to "handle it," induced and encouraged the employees of L. A.-Seattle, by orders, force, threats or promises of benefits, not to transport or handle the goods of Sealright. After November 14, as a result of the above conduct of [the Union] the employees of L. A.-Seattle refused to transport or handle the goods of Sealright. [The Union] engaged in the foregoing conduct to force or require L. A.-Seattle to cease handling or transporting the products of Sealright.
>
> * * * * *
>
> (f) On November 17, 1947, while employees of West Coast were engaged in loading the rolls of paper onto freight cars consigned to Sealright in Los Angeles, a group of pickets representing [the Union] appeared at the docks of West Coast and, by forming a picket line around the freight cars being loaded with rolls

> of paper for Sealright, induced and encouraged the employees of West Coast, by orders, force, threats or promises of benefits, not to handle or work on the paper consigned to Sealright. Since November 17, 1947, as a result of the above conduct of [the Union] and the continued picketing by [the Union] of the docks of the West Coast, the employees of West Coast have refused to handle or work on the goods consigned to Sealright. [The Union] engaged in the foregoing conduct in order to force or require West Coast to cease handling or transporting the products of Sealright.

It is clear, we submit, that appellants' conduct, summarized above, clearly falls within the proscription of Section 8 (b) (4) (A) of the Act and constitutes an unfair labor practice within the meaning of that section. Plainly, appellants did, in the language of Section 8 (b) (4) (A) of the Act—

> * * * induce and encourage [by picketing] the employees of any employer [L. A.–Seattle and West Coast] to engage in a strike or a concerted refusal in the course of their employment to * * * transport or otherwise handle or work on any goods, articles, materials or commodities or to perform any services [for L. A.–Seattle and West Coast] where an object thereof is (A) forcing or requiring any employer [L. A.-Seattle and West Coast] * * * to cease * * * handling, transporting * * * or otherwise dealing in the products of any other producer, processor or manufacturer [Sealright], or to cease doing business with any other person [Sealright].

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Accordingly, a clear basis for granting the relief required under the Act is established unless, as appellants' argue (1) Section 8 (b) (4) (A) of the Act violates either the First, Fifth or Thirteenth Amendments to the Constitution, or (2) appellants' conduct is privileged under Section 8 (c) of the Act, or (3) the provisions of the Act conferring jurisdiction on the district courts to grant interlocutory relief are invalid under Article III of the Constitution. We discuss these contentions below.

II

Section 8 (b) (4) (A) of the Act and the order of the court below based thereon do not invade any constitutional rights of appellants

1. The nature of the evil dealt with by Congress in Section 8 (b) (4) (A) of the Act

In 1935, the 74th Congress, which enacted the National Labor Relations Act, found that the denial by employers of the right of employees to organize for purposes of collective bargaining with respect to wages and other conditions of employment led to industrial strife which burdened and obstructed commerce. In order to eliminate this prolific source of industrial unrest and thereby promote the free flow of commerce, Congress, by enactment of the statute, sought to protect against employer interference the exercise by workers of full freedom of association and self-organization for purposes of collective bargaining and other mutual aid and protection. The constitutionality of the statute was upheld in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1.

Under the aegis of the statute labor organizations grew in strength and power.[5] Twelve years of experience under the National Labor Relations Act led the 80th Congress to conclude in 1947 that certain practices by labor organizations, whose growth and power had been in no small measure promoted and strengthened by the statute, were also a prolific source of widespread industrial unrest and seriously obstructed interstate commerce and impaired the interest of the public in the free flow of such commerce. One of these disruptive practices was the so-called labor secondary boycott. On the basis of the personal experience and observations of its members as well as extensive testimony before Congressional committees, the 80th Congress concluded that such boycotts, extending, as they do, labor-management disputes beyond the plant or company where the dispute originally arose to other employers or companies who are not directly involved in, and are powerless to correct, the basic dispute, were a serious threat to the well-being of the Nation.[6]

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[5] Peterson, Florence, *Survey of Labor Economics*, pp. 493–494 (1947). The membership of unions in this country was placed at 4,000,000 in 1935 (*ibid.*). By 1947 this membership, according to a press release, dated December 1947, issued by the U. S. Department of Labor, had increased to approximately 15,500,000.

[6] Hearings before Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess., pp. 59–63, 969, 1496–1497, 1717–1718, 1732–1733, 1801, 2060–2061, 2148; Hearings before House Committee on Education and Labor, 80th Cong., 1st Sess., pp. 467–477, 539, 547–548, 549, 1001–1002, 1860, 1876, 2149–2150, 2530, 2547, 2572–2586, 2690; S. Rept. No. 105, 80th Cong., 1st Sess., pp. 7–8; H. Rept. No. 245, 80th Cong., 1st Sess., pp. 4–5, 23–24; 93 Cong.

Experience also demonstrated, as the legislative hearings show, that one of the most effective devices for achieving such boycotts was the picket line placed at the plant of an employer who, while not himself involved in a labor dispute, did business with an employer who was involved in such a dispute. Congress found that by means of such picketing labor organizations had sought to induce and encourage employees of neutral employers to strike or to engage in concerted refusals to perform services in the course of their employment and thereby compel their employer to cease transporting or handling or otherwise dealing in the products of, or otherwise doing business with, the employer involved in the labor dispute.

The effectiveness of picketing in achieving these objectives, as Congress was informed, is notorious. Union workers simply do not, save in exceptional circumstances, cross a picket line. The attention of Congress was directed to numerous instances where important segments of the Nation's economy had been seriously disrupted as a result of picketing in furtherance of such boycotts.[7] Congress believed that such activities represented a potentially far reaching threat to the economic well being of the Nation, particularly in view of the extensive unionization of employees occurring since the passage of the National Labor Relations Act in 1935 and the consequent power

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Rec. 1910, A 1099, A 1296, 3560, A 2012, 3950, 3954, 4323, 4492, 5038, A 2378. References to the Congressional Record throughout this brief are to the daily Congressional Record and not to the bound volumes.

[7] See note 6, *supra*.

wielded by labor organizations. As Senator Taft, one of the sponsors of the Act, pointed out in the course of the legislative debate on the bill which became the Act, the incitation of employees by labor organizations to engage in strikes or concerted refusals to handle goods or perform services in the course of their employment for the purpose of compelling an employer to cease doing business with an employer who is involved in a labor dispute can bring about a "chain reaction that will tie up the entire United States in a series of sympathetic strikes * * *."[8]

The enactment of this section of the Act represents therefore a deliberate legislative judgment and purpose to protect the interest of the public in the free flow of commerce by limiting the area of unrestricted industrial warfare and confining it to the extent provided by the section to the employer or company whose employees are directly involved in a labor dispute.

2. Section 8 (b) (4) (A) of the Act and the order of the court below do not infringe upon the constitutional guaranties of freedom of speech, due process or freedom from involuntary servitude

Appellants contend that Section 8 (b) (4) (A) of the Act and the order of the court below, insofar as they purport to enjoin picketing in furtherance of the objectives proscribed by the Act, are an invasion of the First Amendment's guarantee of freedom of speech, the Fifth Amendment's guaranty of due process, and the Thirteenth Amendment's prohibition of involuntary servitude. We submit that no constitu-

[8] 93 Cong. Rec. 4323.

tional infirmity attaches either to Section 8 (b) (4) (A) of the Act as construed by the court below, or to the order of that court.

(a) The instant case presents no invasion of the guarantee against involuntary servitude

At the outset it is important to define the precise boundaries of the issues presented in the instant case. Section 8 (b) (4) (A) of the Act is an exercise of the power of Congress to eliminate interruptions to interstate commerce, whatever their source. *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. The power to regulate commerce is "the power to enact 'all appropriate legislation' for its 'protection or advancement' * * *; to adopt measures 'to promote its growth and insure its safety' * * *; to 'foster, protect, control and restrain' * * *. That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' " *Jones & Laughlin* case, *supra,* pp. 37–38. In the exercise of this plenary power, Congress, just as it may constitutionally regulate employer practices giving rise to labor disputes affecting commerce (*Jones & Laughlin* case, *supra*), may also regulate the activities of labor organizations where those activities interfere with or restrain the free flow of commerce. *Texas & N. O. Ry. Co.* v. *Brotherhood,* 281 U. S. 548; *Wilson* v. *New,* 243 U. S. 332; *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 488; *United States* v. *Hutcheson,* 312 U. S. 219, 232; *Allen Bradley Co.* v. *Local Union, No. 3,* 325 U. S. 797, 810.

Contrary to appellants' contention (Br. 76–81), no question arises here as to the right of employees to quit work or to work on any terms they may themselves choose. The statute does not make it an unfair labor practice for employees to cease work for any purpose.[9] Employees as such are not subject to the unfair labor practices provisions of the Act. The limitation prescribed by Section 8 (b) (4) (A) of the Act is imposed upon *labor organizations* and their agents and the statute makes it an unfair labor practice for a *labor organization* or its agents to engage in a strike or to induce or encourage employees in the course of their employment to engage in a concerted refusal to perform services for the objectives enumerated in the Act. In conformity with these provisions of the Act, the order of the court below enjoins appellants and their agents (not employees as such) from engaging in conduct violative of Section 8 (b) (4) (A) of the statute.

Thus, it is clear that Congress has precluded any possible successful challenge to Section 8 (b) (4) (A) of the Act, or court orders based thereon, which might be predicated upon the Thirteenth Amendment. No

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[9] Section 502 of the Act specifically provides:

"Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent: nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

claim can be made that to restrain a labor organization from inducing or encouraging employees to engage in a strike or a concerted refusal to perform services in the course of their employment is a violation of the guarantee against involuntary servitude. Indeed, the Supreme Court recently brushed aside such a contention tersely as being "without merit." *United States* v. *United Mine Workers,* 330 U. S. 258. And in *Dorchy* v. *Kansas,* 272 U. S. 306, at p. 311, the Court, speaking through Mr. Justice Brandeis, implicitly rejected such a contention when it declared "* * * and it [the legislature] may subject to punishment him who uses the power or influence incident to his office in a union to order the strike."

The order entered herein is wholly consistent with the foregoing principles. It enjoins appellant Union and its agent from engaging in the unfair labor practices charged. Insofar as the order runs against all persons in active concert or participation with them, the order does no more than bind appellants and "those identified with them in interest, in 'privity' with them, represented by them or subject to their control. In essence, it is that [appellants] may not nullify [the order] by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Regal Knitwear Company* v. *N. L. R. B.,* 324 U. S. 9, 14. Nothing contained in the order enjoins employees from quitting work.

Moreover, apart from the foregoing considerations, it is well settled that the constitutional privilege

against involuntary servitude is essentially a personal one (*Slaughterhouse* cases, 83 U. S. 36, 39), belonging here to the individual employees who have been induced by appellants to engage in a concerted refusal to perform services. Accordingly, the privilege, even if it were involved, which it is not, could be invoked solely by them and not by appellants on their behalf. Cf. *United States* v. *White,* 322 U. S. 694, 705.

(b) Congress may constitutionally prohibit peaceful picketing to induce strikes or concerted refusals to perform services in furtherance of secondary boycotts

Appellants' principal contention is, in substance (Br. 27–52), that Section 8 (b) (4) (A) of the Act, and the order of the court below, insofar as they enjoin appellants from inducing or encouraging, by picketing, employees to engage in strikes or concerted refusals to perform services, for the objectives set forth in the Act, violate the constitutional guaranty of free speech.

The Supreme Court has said that peaceful picketing as a means of communicating the facts of a labor dispute "may be a phase of the constitutional right of free utterance." *Carpenters Union* v. *Ritters' Cafe,* 315 U. S. 722, 727. But the Supreme Court has also said, in substance, that this does not mean, and has never meant, that "A state is * * * required to tolerate in all places and all circumstances even peaceful picketing by an individual." *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769, 775. For, as Mr. Justice Douglas pointed out in his concurring opinion in the *Wohl* case (315 U. S., at pp. 776–777):

> Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.

It is clear that the assimilation of picketing to speech does not mean that picketing, however peaceful, is wholly immune from regulation by the community in order to protect the general welfare. The community still has power to confine the use of this weapon of industrial combat, as the Supreme Court has recognized it to be, within reasonable bounds. And the community may, for the purpose of advancing and protecting the public interest and without infringing constitutional guaranties, confine "the sphere of communication" and thereby localize industrial warfare. As pointed out by the Supreme Court in the *Ritter* case, *supra* (at pp. 724–727, 727–728).

> The economic contest between employer and employee has never concerned merely the immediate disputants. The clash of such conflicting interests inevitably implicates the well being of the community. Society has therefore been compelled to throw its weight into the contest. The law has undertaken to balance the effort of the employer to carry on his business free from the interference of others against the effort of labor to further its economic self interest. And every intervention of government in this struggle has in some respect abridged

the freedom of action of one or the other or both.

The task of mediating between these competing interests has, until recently, been left largely to judicial lawmaking and not to legislation. "Courts were required, in the absence of legislation, to determine what the public welfare demanded;—whether it would not be best subserved by leaving the contestants free to resort to any means not involving a breach of the peace or injury to tangible property, whether it was consistent with the public interest that the contestants should be permitted to invoke the aid of others not directly interested in the matter in controversy; and to what extent incidental injury to persons not parties to the controversy should be held justifiable." Mr. Justice Brandeis in *Truax* v. *Corrigan,* 257 U. S. 312, 363. The right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted.

* * * * *

Where, as here, claims on behalf of free speech are met with claims on behalf of the authority of the state to impose reasonable regulations for the protection of the community as a whole, the duty of this Court is plain. Whenever state action is challenged as a denial of "liberty," the question always is whether the state has violated "the essential attributes of that liberty" * * * While the right of free speech is embodied in the liberty, safeguarded

by the Due Process Clause, that Clause postulates the authority of the states to translate into law local policies "to promote the health, safety, morals and general welfare of its people. * * * The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise."

* * * * *

It is true that by peaceful picketing workingmen communicate their grievances. As a means of communicating the facts of a labor dispute, peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute.

* * * * *

We must be mindful that "the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants." *Thornhill* v. *Alabama,* 310 U. S. 88, 103–04.

In enacting Section 8 (b) (4) (A) of the statute, Congress carefully balanced and weighed the conflicting interests of labor to further its economic self-interest, of the employer to carry on his business free from interference of others, and, particularly, of the public in the free and unrestricted flow of commerce.

It found, as already stated, that strikes in furtherance of boycotts of the type proscribed by the Act were, particularly in the aggregate, a substantive evil of sufficient magnitude as seriously to interfere with and restrain commerce and impair the national well-being. Accordingly, Congress concluded that the national interest made imperative the narrowing of the area of industrial conflict by the elimination of strikes to further such boycotts. It therefore made it an unfair labor practice for a labor organization, through the device of, *inter alia,* picketing, to conscript the aid of employees, and through them, of their employers, who were not directly concerned in the labor dispute precipitating such picketing, in order to bring pressure to bear upon the employer directly involved in the dispute. That is to say, Congress deemed it desirable and essential for the protection of the community as a whole "to insulate from the dispute" (*Ritter* case, *supra*), in the manner and to the extent provided in the statute, employees and employers who were not directly involved therein. Such a legislative judgment on a matter of serious controversial[10] public policy must "weigh heavily in any challenge of the law as infringing constitutional limitations." *Cantwell* v. *Connecticut,* 310 U. S. 296, 307–308. The

[10] The Supreme Court has frequently pointed out that the legislative judgment with respect to matters of public policy, particularly those of a highly controversial nature, is entitled to great weight in determining the constitutionality of legislation. See e. g. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154; *Hebe Company* v. *Shaw*, 248 U. S. 297, 303; *Block* v. *Hirsh*, 256 U. S. 135, 154.

means chosen by Congress to achieve its purposes are "appropriate to the permissible end." *Virginia Ry. Co.* v. *System Federation,* 300 U. S. 515, 558. And, we submit, the limitations imposed upon picketing by Section 8 (b) (4) (A) of the Act are a proper instance of the power of Congress, in the exercise of its plenary control over commerce and for the protection of the community as a whole, "to set the limits of permissible contest open to industrial combatants." *Thornhill* v. *Alabama,* 310 U. S. 88, at pp. 103–104.[11]

These limitations, as applied here, in no way encroach upon " 'the essential attributes' " (*Ritter* case, *supra*) of the right of Sealright employees or their representatives, to inform the public of the facts of their dispute with their employer. Appellants are left free to use the "traditional modes of communication" other than picketing the business places of neutral employers, such as

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[11] The circumstance that the restriction upheld in a case like the *Ritter* case represents an exercise of the police power of a State and that the restriction here in question is an exercise of the Congressional power over commerce is of no significance. Cf. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146 where the Court stated (at pp. 156-157) :

"That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose. * * * The war power of the United States, like its other powers, and like the police power of the States, is subject to applicable constitutional limitations * * *; but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power."

L. A.-Seattle and West Coast, for the purpose of publicizing their grievances with their real adversary, namely Sealright. Cf. *Ritter* case, *supra,* pp. 727–728. The instant case does not present the "unlimited ban on free communication," "baldly prohibiting all picketing" (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, 297), which impelled the Supreme Court to strike down the anti-picketing statutes involved in *Thornhill* v. *Alabama, supra,* and *Carlson* v. *California,* 310 U. S. 106. Nor is the instant case one where because of peculiar circumstances, such as were found to exist in the *Wohl* case, *supra,* it is impossible for appellants to publicize their legitimate grievances except by picketing the premises of employers who are not immediately concerned in the labor dispute. And this is not an instance where, as in *Cafeteria Employees Union, Local 302* v. *Angelos,* 320 U. S. 293, or *American Federation of Labor* v. *Swing,* 312 U. S. 321, the "right of free communication * * * [has] been mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ." (*Swing* case, at p. 326). Neither appellants nor the workers whom they represent have any dispute with either L. A.–Seattle or West Coast "against which they are seeking to enlist public opinion" (*Swing* case, *supra,* p. 326).

(c) Picketing for an unlawful purpose is not protected by the Constitution

The fact that peaceful picketing may as a form of speech be protected by the Constitution does not mean that Congress cannot proscribe such picketing when carried on, as here, for an unlawful purpose. Section 8 (b) (4) (A) of the Act, in substance, prohibits

labor organizations from engaging in strikes or inducing or encouraging employees to engage in strikes where an object thereof is to bring about a secondary boycott of an employer with whom the labor organization in question has a dispute. This is precisely what appellants sought to do in the instant case. The picket line which appellants established at the terminals of L. A.-Seattle and West Coast was calculated to induce and encourage the employees of those carriers, with whom appellants, or the employees they represent, had no dispute, to refrain from performing services for them with a view to compelling the carriers to cease doing business with Sealright.

The power of Congress to proscribe secondary boycotts such as are denounced by Section 8 (b) (4) (A) of the Act cannot be questioned. *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418; *Loewe* v. *Lawlor,* 208 U. S. 274; *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 493; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Ass'n.,* 274 U. S. 37; *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797; *United Brotherhood of Carpenters and Joiners of America* v. *United States,* 330 U. S. 395.

It is well established that peaceful picketing for an unlawful objective is illegal and may be enjoined.[12] This rule has not been changed by the recent decisions of the Supreme Court. In *Allen Bradley Co.,* v. *Local Union, No. 3,* 325 U. S. 797, the Supreme Court sustained an injunction against peaceful picketing by a labor union the purpose of which was to maintain

[12] Teller, L., *Labor Disputes and Collective Bargaining*, Sections 113–114.

a monopoly in violation of the Sherman Act. In that case, the union had a monopoly on the manufacture and installation of electrical equipment from New York City.[13] In order to maintain its monopoly, the union, by agreement with employers in the New York area, required manufactured equipment brought into New York to be unwired and rewired by its members before installation. This objective was accomplished "by the traditional labor weapons of refusal to work upon disfavored goods, with peaceful and non-violent persuasion, picketing, and blacklisting, and now the active participation of the local employers" (145 F. 2d, at p. 219). There was "a specific finding that there was no evidence of any violence or any threat of violence against any of the plaintiffs by any of the defendants" (145 F. 2d, at p. 219 n.).

The Supreme Court held the conduct of the union unlawful under the Sherman Act because of the association with nonlabor groups. It required the district court to modify its injunction, which had restrained peaceful picketing, boycotting, and striking, "so as to enjoin only those prohibited activities in which the union engaged in combination with any person, firm, or corporation which is a non-labor group * * *" (325 U. S., p. 812), but it left the injunction intact otherwise. The Court thus clearly sanctioned an injunction which forbade peaceful picketing by a union for an unlawful purpose. The fac-

[13] This statement of the case is taken both from the Supreme Court's opinion and from the opinion of the Circuit Court of Appeals (145 F. 2d 215) to which the Supreme Court referred (325 U. S., at p. 798) for a more detailed statement of the facts.

tor of employer cooperation, though of importance under the Sherman Act, clearly has no constitutional significance. The opinion recognizes this in replying to the criticism contained in Mr. Justice Roberts' separate opinion that its holding meant that a union could accomplish the same end if it did not act in combination with business groups. In this connection the opinion states (325 U. S., at p. 810):

> This, it is argued, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress. *Apex Hosiery Co.* v. *Leader, supra.*

Numerous state supreme courts have held that peaceful picketing for an unlawful purpose may be prohibited. Typical of these holdings is the decision of the Oregon Supreme Court in *Peters* v. *Central Labor Council,* 169 P. 2d 870, where the court stated (at p. 874):

> * * * It is significant that in those cases where the Supreme Court [of the United States] identified picketing with free speech no unlawful purpose of the picketing was involved. That courts may take into consideration the purpose of the picketing is established by the great weight of authority.

Accord: *Employment Relations Board* v. *Milk and Cream Drivers' Employees Union,* 238 Wis. 379, 299 N. W. 31, cert. denied 316 U. S. 668 (1941); *Northwestern Pacific R. R. Co.* v. *Lumber & Sawmill Work-*

ers' Union, 31 A. C. 448, 189 P. 2d 277 (Calif. 1948); *Lafayette Productions* v. *Ferentz,* 305 Mich. 193, 9 N. W. 2d 57 (1943); *Harper* v. *Brennan,* 311 Mich. 489, 18 N. W. 2d 905 (1942); *Fred Wolferman, Inc.* v. *Root,* 204 S. W. 2d 733 (Mo.), cert. denied 68 S. Ct. 608 (1948); *Colonial Press, Inc.* v. *Ellis,* 321 Mass. 495, 501, 74 N. E. 2d 1 (1947); *Florsheim Shoe Store Co.* v. *Retail Shoe Store Union,* 288 N. Y. 188, 42 N. E. 2d 480 (1942); *Bloedel-Donovan Lumber Mills* v. *International Woodworkers,* 4 Wash. 2d 62, 102 P. 2d 270 (1940).[14]

Whether Congress could prohibit all peaceful picketing by declaring all labor objectives unlawful is a question that is not presented by this case. For, as said by Judge Learned Hand in a case that has often been cited, "most constitutional problems in the end resolve themselves into the question, How far? and there is no royal road to their solution by rhetorically conjuring up outrageous possibilities which may arise from their unflinching application." *Dryfoos* v. *Edwards,* 284 F. 596, 600 (S. D. N. Y.), aff. 251 U. S. 146. See also, *Noble State Bank* v. *Haskell,* 219 U. S. 104, 113. It is enough for the purposes of this case that Congress has the unquestioned power to make

[14] See also Dodd, *Picketing and Free Speech: A Dissent,* 56 Harv. L. Rev. 513 (at p. 524):

"* * * Picketing is, however, more than the statement of a case. * * * When made use of by strikers, it is an express or implied invitation to the public to aid the strikers by refraining from dealing with their employer. If the concerted action of the strikers is unlawful by reason of its purpose, it would be difficult to uphold the contention that they have a constitutional right to attempt to urge others to assist them in accomplishing that purpose."

unlawful strikes to further secondary boycotts such as those denounced by Section 8 (b) (4) (A) of the Act. See cases, *supra*, p. 28.

Appellants contend that in any event Section 8 (b) (4) (A) of the Act was not intended to prohibit conduct of the type enjoined by the court below. Specifically, appellants argue (Br. 53–57) that the legislative history of Section 8 (b) (4) (A) shows that the application of that section is confined to such secondary boycotts as involve "full scale economic sanctions * * * by a union against an employer with whom no dispute exists for the purpose of compelling him to shun commercially the firm where the primary dispute exists" and that the Act was not intended to proscribe "picketing the products of the struck plant."

The Act itself draws no such line of distinction. It makes it an unfair labor practice for a labor organization or its agents to induce or encourage employees to engage in a concerted refusal in the course of their employment to process, transport, or otherwise handle or work on any goods for the enumerated objectives. The Act, by its express terms, prohibits the incitation of employees by labor organizations to engage either in a total strike or what may be termed a partial strike in furtherance of the objectives set forth in Section 8 (b) (4) (A).

Nor does the legislative history of the Act suggest that Congress intended any such distinction. On the contrary, it is apparent that Congress, aware that differentiations of that nature were being urged, declined to draw such a line. Thus, in the course of the

legislative debate on the bill, Senator Taft, one of its sponsors, explaining Section 8 (b) (4) (A), stated:[15]

> * * * we are dealing with the checking of deliveries through secondary boycotts or jurisdictional strikes. * * * The trouble is that the man drives up to the delivery point, and because the teamsters' union says that he does not have a teamsters' card, then the union in the plant, the unloaders or longshoremen, or whatever they may be will not unload his truck. That is what we are trying to reach in this case.

Again, in answer to the objection contained in the President's veto message that the bill indiscriminately outlawed all secondary boycotts,[16] Senator Taft said:[17]

> There was no testimony in the record anywhere to the effect that secondary boycotts and jurisdictional strikes were justified. We asked the President's representatives as to what kinds of secondary boycotts were justified, but we never got a satisfactory answer.

It is evident from the foregoing that Congress did not intend to make any distinction between what appellants characterize as a "full scale secondary boycott" and a "product boycott."

Moreover, such a distinction would be wholly inconsistent with the basic purpose of Section 8 (b) (4) (A) of the Act. As already shown, Congress sought to remove the impediments to the free flow of commerce which resulted from the incitation of the em-

[15] 93 Cong. Rec. 5069.
[16] 93 Cong. Rec. 7500, 7501.
[17] 93 Cong. Rec. 7690.

ployees of a neutral employer to engage in a concerted refusal, among other things, to handle or work on any goods or perform any services in order to bring pressure to bear upon an employer engaged in a labor dispute. Whether employees of the neutral employer engage in a total strike or in a "product boycott," the effect upon the free flow of commerce is the same, differing only in degree.

(d) Section 8 (b) (4) (A) of the Act does not violate the Fifth Amendment's guaranty of due process

Appellants contend (Br. 71–74) that Section 8 (b) (4) (A) of the Act, insofar as it prohibits labor organizations from inducing or encouraging employees to engage in strikes for the enumerated purposes, is so vague and indefinite as to be violative of the due process guaranty of the Fifth Amendment. In support of this argument appellants invoke the rule applicable to penal statutes that where such a statute is so vague and indefinite that men of common intelligence must necessarily speculate as to its meaning it is unconstitutional. Such a strict test has, of course, no application to the Act, for it is well established that the "standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters* v. *New York,* 333 U. S. 507, 515.

But whatever the applicable test, Section 8 (b) (4) (A) is, we submit, immune to successful challenge upon the ground of vagueness or indefiniteness. As more fully stated below (pp. 35–36), Section 8 (b) (4) (A) must be read in conjunction with Section 8 (c) of the

statute. So read, Section 8 (b) (4) (A) provides that it shall be an unfair labor practice for a labor organization to engage in a strike or to induce or encourage, *by threat of reprisal or force or promise of benefit,* the employees of any employer to engage in a strike or concerted refusal, *et cetera.* Assuming for the sake of argument that Section 8 (b) (4) (A) standing alone might be invalid because of vagueness, the addition of the underscored qualification plainly leaves no room for doubt as to its meaning. The language thus used is as specific as the nature of the problem permits. And it "provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges * * * fairly to administer the law in accordance with the will of Congress." *United States* v. *Petrillo,* 332 U. S. 1, 7.

(e) The order does not invade any rights of appellants under Section 8 (c) of the Act

Appellants further contend (Br. 58–70) that the order of the court below, insofar as it restrains peaceful picketing, infringes appellants' rights under Section 8 (c) of the Act and hence is invalid. This contention, we submit, is likewise without merit.

Section 8 (c) of the Act provides that, "The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute, or be evidence of, an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." The language of Section 8 (b) (4) (A), in view of the phrase

"under any provisions of this Act" contained in Section 8 (c) must, we think, be read in conjunction with the latter provision. But this does not mean that picketing, such as conducted here, is withdrawn from the proscription of Section 8 (b) (4) (A).

Realistically viewed, it cannot be doubted that picketing, whatever its speech aspect may be, is more than speech. It is, as the Supreme Court has pointed out, an "industrial weapon." *Ritter* case, *supra,* at p. 725. It is, as the court below noted (R. 111), a "forcible technique" which cannot be regarded solely as an appeal to the reason of workers or merely as a method for the dissemination of the facts of a labor dispute. It is more than that. It possesses elements of compulsion. For, as Mr. Justice Douglas pointed out in his concurring opinion in the *Wohl* case, "the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated" (315 U. S., at p. 776).[18] Because of this aspect, picketing, we

[18] Cf. Gregory, Charles O., *Labor and the Law* (1946), pp. 346–348:

"* * * It seems plain enough to many disinterested people that picketing, even peaceful picketing, it not at all just speech or the dissemination of information but is, rather, a type of coercion and is intended as such by its users. * * * How does the loyal employee, who wants to stay at work during a strike, react to picketing, and why? If he finally decides to stay at home during the strike, rather than cross the picket line, does that mean he has been convinced of the merits behind the union's cause? And how about an applicant for employment during a strike, who decides not to cross a picket line, although he may need the work? * * * Are they inclined to this decision because they are convinced of the merits behind the union's cause? And when the members of other unions unrelated by any common economic

submit, cannot be regarded as simply an expression of views, argument, or opinion within the meaning or protection of section 8 (c).

Other considerations also remove picketing from the protection of Section 8 (c) of the Act. Picketing constitutes an appeal to all working people to make common cause with the picketing group. Implicit in such an appeal is the promise that if the workers to whom the appeal is directed respond to the appeal the union or workers making the appeal will, in turn, if the occasion should arise, lend similar support to the workers whose assistance and cooperation is sought. Conversely, the appeal carries with it the threat that if it is ignored the union or workers making the appeal will, whenever the occasion arises, refuse to support those workers who fail to cooperate. As the Second Circuit Court of Appeals stated in *N. L.*

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interest to the picketing union, refuse to enter picketed premises, are they reacting to personal intellectual conviction concerning the worth of the picketers' cause, or are they merely reacting to some tacitly understood signal that their sympathy is expected and must be given pursuant to established labor union policies?

"It is hard to believe that the reactions here recounted are all expressions of intellectual conviction as to the worth of the picketing unions' several causes. * * * Such a procedure is, indeed, a dubious venture into the world of ideas and opinions, and hardly seems to be the sort of thing contemplated by the constitutional guaranty of free speech. Rather, it suggests a sort of psychological embargo around the picketed premises, depending for its persuasiveness on the associations most people have in mind when they think about picketing. Hence it is likely that people hesitate to cross picket lines more because they wish to avoid trouble and to escape any possible scorn that might be directed toward them for being antiunion, than because they are persuaded intellectually by the worth of the picketing union's cause. * * *"

R. B. v. *Peter Cailler Kohler Swiss Chocolates Co., Inc.*, 130 F. 2d 503, in terms equally applicable here (at pp. 505–506):

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection" although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts. So too of those engaging in a "sympathetic strike," or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased.

Viewed in this light, the picketing here under consideration carried with it an implicit promise of benefit, as well as a threat of reprisal, to those workers who heeded or ignored, as the case may be, the appeal for cooperation. Hence, the requirement of Section 8 (c) of the Act, that no expression of views, argument or opinion shall constitute or be evidence of an unfair labor practice within the meaning of the Act unless such expression contains a threat of reprisal or promise of benefit, is fully met.[19]

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[19] This is not to say that peaceful picketing of an employer involved in a labor dispute insofar as it seeks to induce any of his employees to join in a strike runs afoul of Section 8 (b) (1) (A)

The fact that the pickets did not make overt or explicit threats of reprisal or force or promises of benefit does not necessarily mean that the picketing is protected under Section 8 (c) of the Act. As shown by the legislative history of the Section, it is sufficient if the threat or promise is implicit in such conduct. The purpose of Section 8 (c) was to preclude the Board from taking into consideration in making findings of unfair labor practices, as Congress thought the Board had done in the past, unconnected or remote statements of attitude. Thus, as explained by the House Report on the original House version of Section 8 (c), "if an employer criticizes a union, and later a foreman discharges a union official for gross misconduct," the Board may not " 'infer,' from what the employer said, perhaps long before, that the discharge was for union activity." [20] Similarly, the Senate Re-

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of the Act, which makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act, i. e., the right to engage in or to refrain from engaging in concerted activities for purposes of collective bargaining or other mutual aid or protection. Section 13 of the Act provides that nothing in the statute except as specifically provided therein shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right. The legislative history of the Act shows that Congress did not intend to illegalize strikes against a primary employer, as distinguished from a secondary employer, in support of demands for changes in terms and conditions of employment (93 Cong. Rec. 3950, 6603; H. Rept. No. 510, 80th Cong., 1st Sess., p. 43). Picketing of the primary employer in such circumstances is an incident of the right to strike. Just as the right to strike under such circumstances is protected, so too is the right to picket the primary employer.

[20] H. Rept. No. 245, 80th Cong., 1st Sess., p. 33.

port on the original Senate version of Section 8 (c) stated that the Board may not hold "speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated."[21] The House Conference Report on the bill which became the Act explained the purpose of Section 8 (c) as follows: "The necessity for this change in the law" was to prevent "using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose."[22]

In the course of the debates on the bill which became the Act, Senator Ellender, a member of the Senate committee which considered the bill, stated that the purpose of Section 8 (c) was to preclude the use of "a casual speech" "no matter how remote or how separable" as "a part of the pattern of unfair labor practices."[23] Senator Taft, one of the sponsors of the bill, in answer to a question from Senator Pepper whether certain statements on the part of an employer which standing alone contained no threat or promise of benefit could be considered as evidentiary of unfair labor practices, replied:

> All of these questions involve a consideration of the surrounding circumstances * * * There would have to be some other circumstances to tie in with the act of the employer.[24]

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[21] S. Rept. No. 105, 80th Cong., 1st Sess., p. 23.
[22] H. Report No. 510, 80th Cong., 1st Sess., p. 45.
[23] 93 Cong. Rec. 4261.
[24] 93 Cong. Rec., pp. 6604–6605.

It is apparent from these remarks that Congress by Section 8 (c) did not intend that the Board should never be free to take into consideration statements of attitude which did not in their context contain threats or promises of benefits. This conclusion is borne out by a significant change which was made in the House version of Section 8 (c) prior to its incorporation in the Act. Section 8 (d) (1) of the House bill (H. R. 3020) originally provided that the expressing of any views, arguments, or opinions shall not constitute or be evidence of an unfair labor practice "if it does not by *its own terms* threaten force or economic reprisal" [italics supplied]. The final version of Section 8 (c), as enacted, eliminated the phrase "by its own terms." This deletion persuasively suggests that Congress did not intend that the threats and promises of benefits which remove expressions of views and opinions from the protection of Section 8 (c) must necessarily appear in the context of such statements. And the deletion, coupled with the explanation of the sponsors of the Act, strongly indicates that Congress sought to do no more than to bar consideration of remote utterances having no rational connection with the particular conduct in question. Certainly, it was not the intention of Congress to preclude a consideration of threats or promises of benefit where, as here, they are implicitly and inextricably a part of the conduct in question.

(f) Section 10 (1) does not confer non-judicial functions on the district courts and is not invalid under Article III of the Constitution

Appellants also contend (Br. 82–85) that Section 10 (1) of the Act under which the jurisdiction of the

court below was invoked is invalid because Congress, under Article III of the Constitution, is without power to invest federal district courts with jurisdiction to grant interlocutory relief pending a determination of the unfair labor practice charges by the Board. This contention is clearly untenable.

Article III of the Constitution vests in Congress the power to define the jurisdiction of inferior federal courts. It provides as follows:

> SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish * * *
>
> SECTION 2. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; * * * to controversies to which the United States shall be a party.

Within the limitations of the "case" or "controversy" requirement the power of Congress to define the jurisdiction of the inferior federal courts is plenary. *Lockerty* v. *Phillips,* 319 U. S. 182; *Yakus* v. *United States,* 321 U. S. 414; *Bowles* v. *Willingham,* 321 U. S. 503, 511–512. The grant of jurisdiction to the federal district courts to award interlocutory relief during pendency of proceedings before the Board plainly falls within the scope of this grant of power to Congress.

A determination as to whether interlocutory relief should be granted or denied presents all of the prerequisite indicia of a "case" or "controversy" within

the meaning of Article III. Summarizing these indicia, the Supreme Court stated in *Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227, at pp. 240–241:

> A "controversy" in this sense must be one that is appropriate for judicial determination * * * A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot * * * The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests * * *. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

It has never been doubted that an application to a court of equity for interlocutory relief pending the court's final determination of a case presents a justiciable controversy in the constitutional sense as so defined. Nor does such an application present any the less a justiciable controversy within the meaning of the Constitution because the determination of the "merits" of a case, as under Section 10 (1) of the Act, is reserved to a tribunal other than the one to which application for interlocutory relief is made. *Evans* v. *International Typographical Union,* 76 F. Supp. 881 (S. D. Ind.); *Madden* v. *International Union, United Mine Workers of America,* 22 L. R. R. M. 2164 (D. C. Dist. Col.); *Looney* v. *Eastern Texas R. R. Co.,* 247 U. S. 214; *Erhardt* v. *Boaro,* 113 U. S. 537; *Eastern Texas Ry. Co.* v. *Railroad Commission*

of Texas, 242 Fed. 300 (D. C. W. D. Texas); *Northern Pacific Ry. Co.* v. *Soderberg,* 86 Fed. 49 (C. C. Wash).

That the grant of interlocutory relief upon a *prima facie* showing of facts is not, under Section 10 (1) of the Act, *res adjudicata* upon the "merits" of the case upon a final hearing before the Board, does not deprive the adjudication of its character as an adjudication in a justiciable controversy in the constitutional sense. The opposite conclusion would mean that no federal court in granting a temporary injunction is exercising a jurisdiction within the constitutional power of Congress to grant. The court's decision is, of course, *res adjudicata* as to the issue whether a temporary injunction should be granted upon the record presented.

The jurisdiction conferred on the district courts by Section 10 (1) of the Act entails no exercise of "nonjudicial duties of an administrative or legislative character." *Pope* v. *United States,* 323 U. S. 1, 13. Whether the functions conferred upon a court are judicial, as distinguished from legislative or administrative, does not depend on whether they are designed to aid a legislative or administrative inquiry, but upon whether their exercise comports with the accepted standards of judicial operation. The "question depends" "upon the character of the proceedings." *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 226. The proceeding here "is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in

the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution." *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 489. The grant of interlocutory relief during the pendency of Board proceedings is no less an exercise of judicial power than is the judicial enforcement of an administrative subpena (*Brimson case, supra*), or the judicial enforcement of a final administrative order. (*Federal Radio Commission* v. *Nelson Bros.,* 289 U. S. 266, 274–278). In all three instances the scope of judicial inquiry is shaped to fit the needs of the statutory scheme Congress is empowered to create. As with an administrative subpena, the judicial enforcement of which is required so long as the data demanded is not "plainly incompetent or irrelevant to any lawful purpose" of the agency (*Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 509), and as with the judicial enforcement of a final agency order which becomes incontestable if the legal tests of constitutional power, statutory authority and the basic prerequisites of proof are met (*Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 140), so here, the judicial function is neither abused nor debased by limiting judicial inquiry to ascertaining whether upon presentation of a *prima facie* case the grant of interlocutory relief is "just and proper." *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 216. See, *Pope* v. *U. S.* 323 U. S. 1, 10–12; *Evans* v. *International Typographical Union, supra.*

Appellants argue, however (Br. 82, 86), that the court below abdicated its judicial function of ascertaining whether a *prima facie* case had been estab-

lished warranting the grant of interlocutory relief and accepted the contention that "a Board agent has an absolute right to injunctive relief in proceedings such as the instant case conditioned only upon a determination that 'reasonable cause' exists for his stated belief that an unfair labor practice has been committed" and that the court below was "not entitled to require *prima facie* evidence forming the basis for the Board's agent's belief in making that determination." No such argument was presented to the court below on behalf of appellee and the decision of the court below is in no way predicated upon any such hypothesis. On the contrary, the court below was specifically informed that in a proceeding under Section 10 (1) of the Act, where the facts are in dispute, there is a duty upon the Board's agent to establish by proof to the satisfaction of the district court that upon the facts adduced there is a reasonable probability that unfair labor practices are being committed, as charged, and that injunctive relief is just and proper (R. 201–202, 203). In the instant case, the pleadings, together with the affidavit of appellant Turner attached to the motion to dismiss the petition, disclosed that there was no genuine issue as to any material fact; hence, there was no necessity for adducing any additional evidence. In that state of the record, the court below could, as it did (R. 106), properly determine upon the basis of the pleadings alone that a *prima facie* case had been established warranting interlocutory relief. Cf. Rule 56 (c) of the Federal Rules of Civil Procedure.

Nor is it correct to say, as appellants do (R. 83), that the court below, in disregard of the principles laid down in *Hecht Co.* v. *Bowles,* 321 U. S. 321, issued the injunction without considering whether such relief was just and proper. The Act itself, of course, does not impose an absolute duty upon a district court to grant injunctive relief pursuant to Section 10 (1) merely upon a showing that there is reasonable cause to believe that unfair labor practices as charged are being committed. The Act expressly provides that a district court shall grant such relief as it may deem just and proper. The court below, mindful of the *Hecht* case, as is evident from its opinion, correctly granted the relief sought in the light of "the necessities of the public interest which Congress has sought to protect." *Hecht* case, *supra,* p. 330.

CONCLUSION

It is respectfully submitted that the order of the court below is proper and valid in all respects and that it should be affirmed.

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